

**108th Session**

**Judgment No. 2892**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P. G. T. against the International Telecommunication Union (ITU) on 28 September 2007 and corrected on 7 December 2007, the ITU's reply of 2 April 2008, the complainant's rejoinder of 23 June, the Union's surrejoinder of 6 October 2008, its additional submissions of 8 October 2009 provided at the Tribunal's request, the complainant's comments thereon of 12 October and the ITU's final submissions of 26 October 2009;

Considering the complainant's second complaint against the ITU, filed on 10 March 2008 and corrected on 16 June, the Union's reply of 6 October 2008, the complainant's rejoinder of 12 January 2009, the ITU's surrejoinder of 30 March and its additional submissions of 28 September 2009 provided at the Tribunal's request;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Senegalese national born in 1953, joined the ITU in 2000 as Head of the Financing Strategies Unit at grade P.5. His

fixed-term appointment was extended and in 2004 he was promoted to the post of Chief of the Policies, Strategies and Financing Department, at grade D.1, in the Telecommunication Development Bureau (BDT).

In November 2006 the Director of BDT who, in that capacity, was the complainant's direct supervisor, was elected Secretary-General of the ITU. Having requested in March 2007 that the new Director of BDT complete his 2006 performance appraisal, the complainant was advised to direct his request to the Secretary-General. The latter met with the complainant on the morning of 15 March 2007, and again in the evening with a view to completing the appraisal. He stated that he intended to give the complainant the overall rating of 2, thus indicating that he had partly met the requirements of his position. At some point during the second meeting, the Secretary-General stepped out of his office and instructed an assistant to call for security officers because, as he said, "he was with someone who might be violent". Shortly after the officers had arrived, he asked them to take the complainant back to his office and, after a while, he instructed them to escort him out of the building. The security officers did so and asked the complainant to hand over his badge to them. In the meantime, the Director of BDT had sent an e-mail to several staff members, including the complainant, announcing a new structure for BDT which, he explained, would entail various reassessments of staff on a provisional basis. Among the changes summarised in the e-mail was the complainant's assignment to a post of Special Adviser to the Director.

The complainant wrote to the Deputy Secretary-General on the night of 15 to 16 March and provided his own account of events. He asserted that, in completing his 2006 performance appraisal, the Secretary-General had intended to damage his professional reputation, and he requested that the Deputy Secretary-General clarify the situation. He was advised by letter of 16 March 2007 that, in view of the serious incidents which had occurred on the previous day between him and the Secretary-General, it had been decided to launch an investigation into his behaviour and pursuant to Staff Rule 10.1.3 to suspend him from duty with full pay pending the outcome of

the investigation. By a further letter dated 13 April 2007 the Deputy Secretary-General informed him that an Ad Hoc Commission of Inquiry had been set up in order to conduct the investigation. Decision No. 12975 of 11 April, by which the Commission was established, was appended to the letter.

The Commission issued its report on 10 May 2007. It found that the Secretary-General's decision to call for the intervention of security officers on 15 March was justified and it recommended that disciplinary proceedings be initiated against the complainant. By letter of 11 May the Deputy Secretary-General informed him that he had decided to initiate disciplinary proceedings against the complainant, on the grounds that his "aggressive behaviour" during the second meeting of 15 March was "likely to constitute serious misconduct within the meaning of Staff Rule 10.1.1". He was invited to respond to this charge, and in due course the matter was referred to the Joint Advisory Committee. The Secretary-General subsequently decided to withhold the complainant's salary step increment, due on 1 August 2007, pending the outcome of the disciplinary proceedings.

Meanwhile, on 23 April, the complainant wrote to the Secretary-General to request a review of several measures taken against him on or after 15 March 2007. He referred in particular to the decision to suspend him from duty, his "humiliating eviction" from the ITU's premises, his reassignment to a "non-existent" post and his 2006 performance appraisal rating. In the event of an unfavourable reply, he sought leave to appeal directly to the Tribunal. His request having been rejected by the Deputy Secretary-General on 4 June, the complainant lodged a first appeal with the Appeal Board on 28 August 2007.

By a letter of 4 September 2007, to which the Joint Advisory Committee's report was attached, the Deputy Secretary-General informed the complainant that he had decided to dismiss him with effect from 7 September 2007, notwithstanding the Committee's advice that none of the sanctions provided for in Staff Rule 10.1.2 a) 3) to 7) should be imposed because the facts of the case could not be established with certainty on the basis of the available evidence.

The complainant filed his first complaint with the Tribunal on 28 September 2007, impugning the decision conveyed to him in the letter of 4 September. Nevertheless, on 11 October his counsel wrote to the Secretary-General to request a “final review” of the decision to dismiss him. In a letter dated 22 November 2007 the Secretary-General replied that, while he considered the complaint to be irreceivable for failure to exhaust the internal means of redress, he had no option but to defer his decision on the complainant’s request for final review until completion of the proceedings before the Tribunal. Interpreting that letter as a rejection of or otherwise a failure to decide on his request for final review of the decision to dismiss him, the complainant lodged a second appeal with the Appeal Board by letter of 20 December 2007, but he asked the Board to suspend its proceedings pending the Tribunal’s decision on his first complaint.

In the meantime, on 6 December, the Appeal Board issued its report on the complainant’s first appeal. It concluded that his suspension from duty had not contravened Staff Rule 10.1.3. By letter of 13 December 2007 the Secretary-General informed the complainant that he had decided to endorse this conclusion and accordingly to reject his appeal of 28 August. That is the decision impugned in the second complaint.

B. In both complaints the complainant challenges several measures taken against him on and after 15 March 2007, alleging that they constitute disguised disciplinary measures imposed in breach of the relevant provisions, that they are tainted with bias and malice on the part of the Secretary-General, and that they seriously damaged his dignity and professional reputation.

The complainant contests his 2006 performance appraisal on the grounds that the Secretary-General lacked the competence and impartiality to complete it. Moreover, the Secretary-General failed to discuss the appraisal with him, which contravened the procedure set

out in the ITU Performance Appraisal Guide and amounted to a breach of the Union's duty to act in good faith. The complainant contends that his 2006 performance appraisal contains substantial errors. He points out that from 2002 to 2005 the Secretary-General, who was at the time his direct supervisor, gave him the overall rating of 4, and he asserts that his performance in 2006 was likewise excellent.

He contends that his "*manu militari* eviction" from the Secretary-General's office on 15 March 2007 constituted harassment, intimidation and abuse of power on the part of the Secretary-General, who falsely alleged that he had displayed aggressive behaviour in order to have him sanctioned on specious charges of misconduct.

According to the complainant, the decision to suspend him from duty was taken in breach of Staff Rule 10.1.3, as the Deputy Secretary-General did not have the authority to take such a decision. Furthermore, it did not mention the reasons for the suspension nor the probable duration of the measure, as required by this provision.

He argues that the decision to establish the Ad Hoc Commission of Inquiry lacked a valid basis and constituted an illegal attempt to bypass the Joint Advisory Committee. The Commission did not afford the necessary guarantees of independence and impartiality, and it did not fulfil the requirements of due process: the complainant was not informed of the applicable procedures or of the concrete allegations against him despite his requests, and he was denied the right to be assisted by counsel, to be present at the hearings and to cross-examine witnesses. Additionally, insofar as the Commission's mandate extended to events that preceded 15 March and which had already been fully investigated, it violated the *non bis in idem* principle.

Regarding the decision to delay his advancement to the next salary step, the complainant contends that it constituted an unlawful and unjustified sanction.

He further challenges in his first complaint the decision to assign him to the post of Special Adviser to the Director of BDT and the

decision to dismiss him. He submits that his assignment to a “non-existing post” with lesser responsibilities amounted to an unlawful demotion, and that it was not justified by the reorganisation of BDT. He contends that in deciding to dismiss him, the Deputy Secretary-General acted *ultra vires* and that the only competent authority to take such a decision was the ITU Council. Noting that the decision stands in contradiction to the Joint Advisory Committee’s advice, the complainant submits that the ITU has failed to demonstrate that he committed serious misconduct and he considers that the dismissal measure was unlawful.

In his first complaint the complainant seeks the quashing of the decision to dismiss him. In his second complaint he seeks the quashing of the decision to suspend him from duty. In each complaint he requests that those responsible for his dismissal be subjected to appropriate disciplinary sanctions and he asks the Tribunal to order his reinstatement in his previous post with all the legal consequences that this implies, including the retroactive payment of the salary and benefits due from the date of his dismissal to the date of his reinstatement. He also asks to be granted a contract extension of five years or, in the alternative, a “service appointment” until the date of retirement, which he sets at 62 in his first complaint and at 60 in his second complaint. In addition, he claims 1 million Swiss francs in moral damages, the same amount in exemplary damages, at least 50,000 United States dollars in costs, and interest at the rate of 8 per cent per annum on all sums awarded. In his first complaint he further requests that a proper performance appraisal be established for 2006. In each of his complaints he requests hearings and asks the Tribunal to order the Union to disclose a number of documents.

C. The ITU replies that the first complaint is irreceivable for failure to exhaust the internal means of redress and points out that, by his letters of 11 October and 20 December 2007, the complainant pursued his internal appeal while, at the same time, bringing the matter before the Tribunal. With regard to the second complaint, it contends that the claims made therein are irreceivable insofar as they are based on facts

and decisions which post-date the decision to suspend the complainant from duty.

On the merits the defendant contends that the complaints are unfounded. It provides its own account of the incidents of 15 March 2007, emphasising that it was the complainant's aggressive and threatening behaviour during the second meeting which prompted the Secretary-General to call for the security officers. Concerning the performance appraisal, it submits that the new Director of BDT was not competent to complete it since he had not supervised the complainant in 2006. It argues that the complainant's interpersonal skills had always been rated lower than his technical competencies and it considers that it was justified in taking into account the deterioration of his relations with his colleagues in 2006 when evaluating his performance.

The ITU explains that the Deputy Secretary-General was the competent authority to take the decision to suspend the complainant and subsequently to dismiss him, given that the Secretary-General was a party to the dispute. It contends that the letter of 16 March 2007 duly mentioned the reasons for the suspension measure and linked it to the outcome of the investigation. In its view, the decision to suspend the complainant from duty complied with Staff Rule 10.1.3 and was justified by his conduct.

The Union points out that, before being assigned to the post of Special Adviser, the complainant had been closely associated with the restructuring process undertaken since January 2007. He received a job description for the post in question on 9 March 2007, subsequently discussed it with the new Director of BDT, and he accepted the post on 15 March, although he retracted his acceptance later that day. The defendant asserts that the duties attached to this post were extremely important.

The ITU contends that the terms of reference of the Ad Hoc Commission of Inquiry differed from those of the Joint Advisory Committee. The Commission was not a disciplinary body but simply investigated at a preliminary stage whether the incidents of 15 March

and earlier events might warrant disciplinary proceedings. It was independent and impartial and bound to respect the adversarial principle. The complainant was duly informed of the charges levied against him and his comments were taken into consideration by the Commission; he was not assisted by his counsel as this was not a litigation proceeding.

As to the decision to delay the complainant's advancement to the next salary step, the defendant submits that it is consistent with paragraph 7 of Service Order No. 01/02, which provides that such increment is granted where the staff member's performance and conduct have been satisfactory.

Lastly, the ITU argues that the decision to dismiss the complainant complied with Staff Rule 10.2.2. It was taken after having asked the Joint Advisory Committee to provide its recommendation and consulting the Director of BDT, and the Deputy Secretary-General explained in the letter of 4 September 2007 the reasons why he could not concur with the Committee.

D. In his rejoinders the complainant maintains that his first complaint is receivable. Relying on the Tribunal's case law, he argues that there was no point in reverting once again to the Appeal Board since his case had been consecutively referred to the Ad Hoc Commission of Inquiry and the Joint Advisory Committee, and the Secretary-General had twice decided against him. He denies the defendant's version of events and presses his arguments on the merits. He contends that the Union has failed to show that the Secretary-General had delegated his authority to the Deputy Secretary-General and asserts that, in any event, the latter could not act independently and impartially. He submits that subsequent events further show the Secretary-General's bias against him.

E. In its surrejoinders the ITU maintains its position. It argues that the complainant misinterprets the Tribunal's case law regarding the receivability of his first complaint, and that he repeatedly attempted to delay the internal appeal proceedings. It adds that the subsequent

events to which the complainant refers are irrelevant to the case before the Tribunal.

F. At the Tribunal's request the Union entered additional submissions contending that, although the complainant was aware that internal means of redress were open to him after his dismissal, he chose to forgo the relevant procedures by filing his first complaint with the Tribunal. It explains that, in the absence of a definition of the term "staff member" in the Staff Regulations and Staff Rules, it must be interpreted in the light of the context and purpose of each provision, and it points out that the complainant was still in service when he lodged his first appeal on 28 August 2007.

G. In his comments on the Union's additional submissions, the complainant reasserts that his first complaint is receivable. In his opinion, he has adequately exhausted the internal means of redress in view of the fact that Chapter X of the Staff Regulations and Staff Rules does not provide for any appeal subsequent to the imposition of a disciplinary measure by the Secretary-General.

H. In its final submissions the ITU reiterates that the Ad Hoc Commission of Inquiry was not a disciplinary body while the Appeal Board is entrusted under the Staff Regulations and Staff Rules with advising the Secretary-General in cases of appeals against disciplinary sanctions. Further, none of the Union's communications can be interpreted as containing an implicit waiver of the requirement that the internal means of redress must be exhausted.

## CONSIDERATIONS

1. The two complaints arise out of the same facts and may conveniently be joined.
2. The complainant met twice with the Secretary-General on 15 March 2007. The stated purpose of the meetings was to discuss the complainant's 2006 performance appraisal. The first meeting, which

took place between 11.45 a.m. and 12.25 p.m., was without incident. The second meeting was held that evening. The events that occurred at that meeting are in dispute. The Secretary-General claims that the complainant “raised several times his tone in a threatening manner”. The complainant, on the other hand, says he was calm throughout. What is not disputed is that the Secretary-General instructed an assistant to call for security officers, saying there was someone in his office who could be violent. Two security officers duly arrived and the Secretary-General was so informed. After a while, the Secretary-General came out of his office and asked the officers to escort the complainant back to his office. A little later, after the complainant had been taken back to his office, the Secretary-General instructed the security officers to escort him from the building. The next day, the Deputy Secretary-General suspended the complainant on full pay and informed him that it had been decided to launch an investigation into his behaviour. Meanwhile, an organisational chart had been distributed during the evening of 15 March, the effect of which was to remove the complainant from his post and assign him to what appears to have been a newly created post as a Special Adviser to the Director of BDT.

3. By a letter of 23 April 2007 the complainant requested the Secretary-General to review the decision to suspend him from duty. He sought compensation for the “humiliating” treatment to which he was subjected on the evening of 15 March, immediate assignment to his former post of Chief of the Policies, Strategies and Financing Department. He also requested that his performance appraisal be “redone” or, alternatively, that that exercise be cancelled. He concluded by asking the Secretary-General to “reconsider the whole matter”. On 4 June 2007 the Deputy Secretary-General replied to the complainant’s letter of 23 April, rejecting his request with respect to his suspension and his eviction from the ITU building. So far as concerns the complainant’s claim to be assigned to the post of Chief of the Policies, Strategies and Financing Department, he merely said that it was not directly linked to the question of his suspension. No response was given to his request relating to his performance appraisal.

4. The complainant lodged an appeal with the Appeal Board on 28 August 2007, referring to the appeal process commenced by his letter of 23 April. He referred to his suspension and his eviction by the Secretary-General but said that these matters were not exhaustive. He attached a document setting out the various claims he had made in his letter of 23 April and the Administration's responses. In its report of 6 December 2007 the Appeal Board identified the appeal as one "against the decision to provisionally suspend the [complainant] from duty". It made no reference to the other matters raised in the complainant's letter of 23 April and set out in the attachment to his appeal. In the result, the Board concluded that "the provisional suspension from duty [...] was not in violation of Rule 10.1.3". The Secretary-General informed the complainant by letter of 13 December 2007 that he agreed with that conclusion and, thus, had decided to dismiss his appeal. That decision is the subject of the second complaint.

5. More or less simultaneously with the complainant's pursuit of his internal appeal relating to his suspension, there were proceedings with respect to the incidents that occurred in the Secretary-General's office on the evening of 15 March. First, an Ad Hoc Commission of Inquiry was established. The Commission reported on 10 May 2007, finding that the behaviour of the complainant could be considered a breach of the Standards of Conduct for the International Civil Service. It recommended that disciplinary proceedings be commenced. On 11 May 2007 the Deputy Secretary-General informed the complainant that disciplinary proceedings would be commenced on the basis that his aggressive behaviour towards the Secretary-General constituted misconduct for the purposes of Staff Rule 10.1.1. In this respect, it was said that the complainant had breached his obligations under Staff Regulation 1.4(b) and the Standards of Conduct for the International Civil Service. The complainant was also informed that he had until 25 May to respond to the charge. He was informed on 19 June 2007 that the matter would be referred to the Joint Advisory Committee. That Committee reported on 17 August 2007, stating that it was not in a position to reach a

conclusion with any certainty, and advised that no sanction be applied. On 4 September 2007 the Deputy Secretary-General informed the complainant that he was satisfied that he was guilty of serious misconduct and had decided that he should be dismissed pursuant to Staff Rule 10.1.2(a)(7) with effect from 7 September 2007. That decision is the subject of the first complaint.

6. The ITU argues that the first complaint with respect to the complainant's dismissal is wholly irreceivable on the basis that, as he has not pursued his internal appeal following his request on 11 October 2007 for a final review of the decision to dismiss him, he has not exhausted internal remedies as required by Article VII, paragraph 1, of the Tribunal's Statute. As the relevant Staff Regulations and Staff Rules provide only for appeals by "staff members", the parties were invited by the Tribunal to make further submissions on the question whether internal appeal procedures were available to the complainant once his dismissal took effect. The Union submits that they were, arguing that he commenced an internal appeal by requesting review on 11 October and filing an appeal with the Appeal Board on 20 December 2007, even though he requested that the appeal be suspended pending the outcome of the proceedings before the Tribunal. It correctly points out that there cannot be concurrent proceedings before the Appeal Board and the Tribunal. However, the question remains whether the Staff Regulations and Staff Rules permit an internal appeal once a person has ceased to be a staff member. If they do not, the steps taken by the complainant to initiate an internal appeal were ineffective. More to the point, there were no internal remedies that he could pursue before lodging his complaint.

7. Chapter XI of the ITU Staff Regulations and Staff Rules makes provision for appeals by staff members. Staff Regulation 11.1 requires the establishment of "administrative machinery with staff participation to advise [the Secretary-General] in case of any appeal by staff members against an administrative decision alleging the non-observance of their terms of appointment, including all pertinent Staff Regulations and Staff Rules, or against disciplinary sanctions".

Staff Rule 11.1.1(2) provides as to the steps to be taken by a “staff member” who wishes to lodge an appeal and Staff Rule 11.1.1(4) sets out the procedure to be followed by a “staff member” in submitting an appeal to the Appeal Board. Staff Regulation 11.2 and Staff Rule 11.2.1 relevantly provide that a “staff member” may appeal to this Tribunal. There is nothing in Chapter XI of the Staff Regulations and Staff Rules to indicate that a former staff member may lodge an appeal as therein provided. Nor is there any provision in the Staff Regulations or Staff Rules defining “staff member” to include a “former staff member”. On the contrary, express provision is made with respect to former staff members in Staff Regulation 4.13 and in Staff Rule 9.7.1(i) and (j) concerning, respectively, re-employment and entitlement to repatriation grants. In these circumstances, the term “staff member” in Chapter XI is to be construed as restricted to a serving staff member.

8. In Judgment 2840, also a case where the relevant regulations and rules relating to internal appeals referred only to a “staff member” and not a “former staff member”, it was held that “where a decision has not been communicated until after a staff member has separated from service, the former staff member does not have recourse to the internal appeal process”. The same is true of a staff member who has either been summarily dismissed or dismissed with such short notice that it is impracticable to commence internal appeal proceedings before the dismissal takes effect. In the present case, the complainant received the decision dismissing him with effect from 7 September 2007 only on 5 September 2007. It is unreasonable to expect that he could or should have commenced internal appeal proceedings in the short period of time before he ceased to be a staff member on 7 September and no longer had access to the internal appeal process. In these circumstances he has access to the Tribunal in accordance with Article II, paragraph 6(a), of its Statute (see Judgment 2582 and the case law therein cited; see also Judgment 2840). It follows that the first complaint is receivable. Whether or not it is receivable in relation to all aspects of the relief claimed is a question that will be dealt with later.

9. So far as concerns the second complaint, the ITU submits that it is receivable only insofar as it is related to the decision to suspend the complainant from duty. Both in his request for review and in his internal appeal, the complainant made claims for what was said to be his “humiliating” treatment on the evening of 15 March, for assignment to the post of Chief of the Policies, Strategies and Financing Department, and the “redoing” of his performance appraisal or, alternatively, that that exercise be cancelled. The formal claims for relief in the second complaint are for reinstatement “to his previous D.1 post” with either a five-year extension, or alternatively, a “service appointment” until the age of 60, compensation for “injury to his professional reputation [...] due to the inaccurate and defamatory statements [...] spread [...] by the [defendant]” and “on account of the devious and reprehensible treatment” that he was subjected to by certain ITU officials, exemplary damages and an order that disciplinary proceedings be instituted against the officials responsible for his wrongful dismissal. As to reinstatement and the claims for associated relief, those claims were not, and could not be made in the internal appeal relating to the complainant’s suspension. They are therefore irreceivable in the second complaint (see Judgments 1149 and 2364). The same claims are, however, made in the first complaint and will be dealt with in relation to the dismissal decision. No claim was made in the internal appeal with respect to defamation and, to that extent, the claim is irreceivable. Again, the defamation claim is made in the first complaint and will be considered later. However, it is reasonable to treat the claim in the second complaint for compensation for the treatment received as encompassing the claim made in the request for review and in the internal appeal for compensation for “humiliating” treatment on the evening of 15 March. It is, to that extent, receivable. Although the formal claims for relief in the second complaint do not refer to the complainant’s performance appraisal, it is claimed within the body of the submissions that the appraisal should “be quashed and removed from his personal file”. That claim is not materially different from the alternative claim in the request for review and in the internal appeal that the exercise be cancelled. Accordingly, that aspect of the

complaint is receivable. Other aspects of the relief claimed in the second complaint will be dealt with later.

10. Rule 10.1.3(a) of the ITU Staff Regulations and Staff Rules provides:

“When a charge of serious misconduct is made against a staff member, and if the Secretary-General or the Director of the Bureau concerned is of the opinion that the charge is well-founded and that the official’s continuance in office pending an investigation of the charge would be prejudicial to the service, he or she may be suspended from duty by the Secretary-General, with or without pay, pending investigation, without prejudice to his rights. Such suspension shall not constitute a sanction in the meaning of Rule 10.1.2.”

11. The first argument advanced by the complainant in relation to the decision to suspend him from duty is that the Deputy Secretary-General had no authority to take such a decision but, rather, as the Secretary-General was an interested party, the question of suspension should have been referred to the ITU Council “as the next level of authority”. It is correct that it was incumbent on the Secretary-General to refrain from taking any decision concerning the incidents that occurred in his office on the evening of 15 March 2007. As stated in Judgment 179, “his impartiality may be open to question on reasonable grounds”. Although Staff Rule 10.1.3 refers only to suspension by the Secretary-General, the doctrine of necessity allows that, where there is a conflict of interest, authority is to be granted to some other appropriate person. However, that does not mean that the question should have been referred to the Council. That body has certain powers with respect to elected officials, but not with respect to unelected officials. As an elected official and as the next most senior official, the Deputy Secretary-General was the appropriate person to exercise authority with respect to the incidents that occurred on 15 March, even if the relevant provision did not so provide.

12. The complainant’s second argument is that, as at 16 March, there was no charge of serious misconduct and nobody could “be of the reasonable opinion that such a charge was ‘well founded’”. This

argument finds some support in two statements in the report of the Appeal Board. The first is that it was “concerned that the Administration’s letter of 16 March 2007 [was] not sufficiently specific in the details of the charge of serious misconduct”. The second is that it “noted that there was no witness to the incident in the office of the Secretary-General leading to the eviction of [the complainant and therefore] it [was] the word of the Secretary-General against that of the [complainant]”.

13. The Deputy Secretary-General’s letter of 16 March 2007 informing the complainant of his suspension relevantly stated:

“In view of the serious incidents that occurred yesterday evening [...] between you and the Secretary-General and, in particular, the words which you used on this occasion which led [him] to call for the services of the ITU security [...] the decision has been taken to launch an investigation into your behaviour.

Also, pursuant to Staff Rule 10.1.3, I have reached the conclusion – in agreement with the Director of BDT – that your continuance in office is likely to be prejudicial to the service.

In consequence, pending the result of the investigation, [...] you are provisionally suspended from duty, with pay, as from today until further notice.”\*

14. Although the letter refers to “words” used by the complainant, it does not make any specific charge, much less a charge of serious misconduct. A person is not charged with misconduct until he or she is told what it is alleged that he or she did. It was not until 11 May 2007 that the complainant was told what he was alleged to have done when he was informed that disciplinary proceedings would be instituted on the grounds that he had displayed “aggressive behaviour” towards the Secretary-General and that that constituted serious misconduct. No charge was made against the complainant prior to that date. Moreover, as the Appeal Board correctly pointed out, there was no independent evidence as to what happened on the evening of 15 March 2007 and there is much to be said for the view that neither the Deputy Secretary-General nor the Director of BDT could reasonably

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\* Registry’s translation of the French original.

be of the view that the charge was well founded. More significantly, it is properly to be inferred that they were not of that view. In this regard, the letter of 16 March 2007 did not say that either of them was. Further, there would seem to be no point in launching an investigation but rather in initiating disciplinary proceedings, if they were of that view. And there being no specific charge, neither could be of the opinion that “the charge [was] well-founded”. At least one of them had to be of that view to satisfy Staff Rule 10.1.3. It follows that the decision to suspend the complainant was not taken in accordance with that rule. It was an error of law for the Appeal Board to find to the contrary. And as the Secretary-General’s decision of 13 December 2007 dismissing the complainant’s internal appeal was based on the Board’s conclusion, it, too, involved an error of law. That decision must be set aside, as must the earlier decision by the Deputy Secretary-General of 16 March 2007.

15. The complainant makes a further argument with respect to the decision to suspend him from duty, namely, that the incidents of 15 March 2007 constituted “harassment, mobbing, bullying and intimidation in direct retaliation [...] and in continuation of the harassment, bias, misconduct and malice directed by [the Secretary-General] against [him] in October 2006 in trying to have [him] [...] sanctioned on specious [...] charges”. That argument, together with the claim for compensation for the “humiliating” treatment on 15 March 2007, will be considered in conjunction with the complaint directed to the complainant’s dismissal. At this stage, however, it is convenient to note that there is no basis for a finding that the Deputy Secretary-General, who took the decision to suspend the complainant, was in any way motivated by bias, ill will, malice or other improper purpose.

16. As earlier indicated, the stated purpose of the meetings of 15 March 2007 was to discuss the complainant’s 2006 performance appraisal. It seems that, until 2005, the complainant and the Secretary-General had a good working relationship and that there was, also, a close relationship between their respective families. In 2006 the

Secretary-General, who was then the Director of BDT, was the complainant's direct supervisor. In that capacity, in September of that year he wrote to the then Secretary-General complaining of the working relationship between the complainant and some members of his staff and asking that the complainant be subjected to disciplinary proceedings and that, in the meantime, he be suspended from duty. The then Secretary-General interviewed one of the staff members concerned and requested the Chief of the Personnel and Social Protection Department to interview the others. The then Secretary-General concluded from these interviews that "there [was] no hard evidence or facts to substantiate these serious accusations and thus no basis to initiate any disciplinary action, much less suspension". He nevertheless accepted that there were "relational difficulties" and suggested as an interim solution that the unit in which the staff members concerned were employed be placed under his direct supervision. However, the complainant's then direct supervisor, the present Secretary-General, placed the particular unit under his own supervision.

17. It is not disputed that the Secretary-General raised the issue of staff relations with the complainant on the evening of 15 March 2007 as part of their discussion concerning the complainant's performance in 2006. Nor is it disputed that there was strong disagreement on the subject. In that context, the Secretary-General stated in a note for the record, dated 16 March 2007, as follows:

"During the interview [...] [the complainant] had, in the beginning, raised several times his tone in a threatening manner when mention was made on his team work weaknesses. He raised the tone of his voice several times saying that 'he is the best in the ITU and challenges anyone to demonstrate the contrary' and was threatening in his gestures and tone. I tried to gently request him to calm down and reminded him that I was his supervisor and would want our discussion to be on an intellectual basis.

Given the level of threat in the expression on his face and the tone of his voice, I had no choice but to ask an Assistant at the Secretariat to request the Security Service to be near my office in the case that I would not be able to control the situation. On a second time, when [the complainant] raised his voice and started shaking his hands and head, that in my judgement, could

reach my physical integrity, I had no choice but to interrupt the meeting and ask the Security Service to escort him from my office.

During this confrontation, he used many times the words ‘I am strong’, ‘I can attack’, ‘I am hard-headed’ and ‘will not back off’, and he constantly repeated that he is like me.”

18. Before considering whether the evidence is capable of supporting the charge of “aggressive behaviour”, it is convenient to explain the basis on which the Ad Hoc Commission of Inquiry and the Joint Advisory Committee reached different conclusions with respect to the incidents of 15 March 2007. The terms of reference of the Ad Hoc Commission of Inquiry required it not only to investigate those incidents, but “as well as, as appropriate, any other documented similar or analogous event that may have arisen before and may possibly shed further light on this incident”. The Commission considered a file retained by the Personnel and Social Protection Department concerning the relations between the complainant and some members of his staff in 2006 and came to the view that it was questionable whether his remarks and his attitude towards his staff were consistent with the Standards of Conduct for the International Civil Service. It concluded that those matters helped to strengthen the account given by the Secretary-General and the evidence of one of the security officers who said that he heard the raised voice of the complainant when he was called to the office of the Secretary-General on the evening of 15 March. On the other hand, the Joint Advisory Committee had regard only to the evidence of the incidents of 15 March and considered that the file concerning the complainant’s relations with some members of his staff in 2006 was irrelevant. In reaching his conclusion that the complainant was guilty of serious misconduct, the Deputy Secretary-General relied on the events of 2006 as well as on a letter of 16 April 2007 from the complainant to the wife of the Secretary-General.

19. The complainant makes various arguments with respect to the events of 2006, including that he was not given an opportunity by the Ad Hoc Commission of Inquiry to question the staff members concerned and that those events should not have been taken into

account because he had already been cleared of misconduct in relation to them. It is unnecessary to consider these arguments as there is no basis upon which the events of 2006, even assuming that they occurred, could be considered probative of the claims made by the Secretary-General with respect to the incidents of 15 March 2007. Evidence that indicates a striking similarity to the incidents in question or reveals a pattern of behaviour – similar fact or propensity evidence – is probative if, and only if, that evidence renders it improbable that the incidents in question did not occur as claimed. The statements from other members of staff provided by the present Secretary-General to the then Secretary-General in 2006 neither reveal a striking similarity with the incidents in question nor a pattern of threatening or abusive language. Accordingly, they are of no probative value in relation to the charge of serious misconduct.

20. In its reply to the second complaint, the ITU submits an e-mail by a staff member relating to an event in December 2005 which, if accepted as true, does indicate that the complainant had already used abusive and threatening language. In its surrejoinder the ITU claims that the “complainant’s threatening behaviour on [that] occasion [...] is an established fact”. However, that event was never investigated and was not the subject of disciplinary proceedings. Moreover, the person concerned has since stated that it was “a one-off and completely isolated incident” and that “the full context [...] is, unfortunately, not readily discernible from the [...] e-mail alone”. An isolated incident does not constitute evidence of a pattern of behaviour. And without context, it is not possible to say that the event in December 2005 bears a similarity, much less a striking similarity, to the matters in respect of which the complainant was charged with serious misconduct. Accordingly, that e-mail is of no probative value in relation to that charge.

21. Save, perhaps, with respect to one of the statements attributed to the complainant on the evening of 15 March 2007, the letter written by him to the wife of the Secretary-General is also without probative value. That letter contains no admission with respect to the incidents in

issue. Its stated purpose was to inform the Secretary-General's wife that the complainant was "neither [her husband's] enemy nor that of his family". The letter concluded with a reference to the fact that they had the same family name and a statement that people with that name were incapable of not fighting back if they felt that they were attacked. Although that statement has some similarity with one of the statements allegedly made by the complainant on the evening of 15 March, the issue is not so much what was said as the tone and manner in which it was said. The letter to the Secretary-General's wife provides no evidence on that issue.

22. It follows, as the Joint Advisory Committee held, that the question whether the complainant is guilty of serious misconduct has to be determined by reference solely to the evidence relating to the incidents of 15 March. And that is essentially the word of the Secretary-General as against that of the complainant. The statement of one of the security officers, who also happens to be the Secretary-General's driver, to some limited extent, corroborates the Secretary-General's account. As already indicated, he said that he heard the raised voice of the complainant. However, and although he speaks French and the discussion between the complainant and the Secretary-General was in French, he could neither recognise the language spoken nor hear what was said. The other security officer, who said that he and the first security officer were in the waiting room for ten minutes before they were asked to escort the complainant back to his office, made no such claim. Moreover, he said that when the Secretary-General emerged from his office the complainant was quite calm. The assistant who called for the security officers said that she heard nothing in particular. However, her office was some distance from that of the Secretary-General.

23. Before further considering whether the complainant was guilty of serious misconduct, it is necessary to note that he has asked for oral hearings and for an order for the production of surveillance tapes and other material that might throw further light on the incidents in the Secretary-General's office. Those applications are dismissed.

Although that material might provide corroboration with respect to some of the incidental details as recounted by either the Secretary-General or the complainant, the question as to what happened in the Secretary-General's office would still depend on the word of one against the other. Incidental details would not reliably resolve the differences in their accounts. It follows that the matter must be determined on the written submissions.

24. It was for the Administration to prove that the complainant was guilty of serious misconduct. The evidence as to what happened in the Secretary-General's office is inconclusive and, thus, the charge of serious misconduct has not been proven. It follows that the dismissal decision of the Deputy Secretary-General of 4 September 2007 must be set aside. The question of further relief will be considered later.

25. It does not follow that, because the Administration has failed to prove misconduct, the charge of serious misconduct was "specious" or part of a campaign of bullying and intimidation, as claimed by the complainant. On that issue the complainant bears the onus of proof. And as the evidence with respect to the incidents in the Secretary-General's office is inconclusive, his claims in this regard must be rejected.

26. As previously indicated, the claim for compensation in the second complaint is receivable insofar as it is a claim with respect to the complainant's treatment on the evening of 15 March 2007. Even on the Secretary-General's account, his instructions to the security officers to escort the complainant from his office and, later, from the ITU building, were disproportionate and an affront to his dignity. There is no suggestion that the complainant engaged in or, in so many words, actually threatened violence. The Secretary-General claims that he asked the complainant to "calm down" and reminded him that their discussion should be on an intellectual basis. However, he did not request the complainant to leave his office or, even, warn him that he would be asked to do so if his behaviour continued – steps that would ordinarily be taken before asking security officers to escort a staff

member from his office. Further, there is no explanation as to why, some five minutes later, the Secretary-General considered it appropriate to ask the security officers to escort the complainant from the building and to insist that he take nothing with him. Presumably, it was in consequence of that last instruction that the complainant was obliged to hand over his badge when leaving the building. The complainant is entitled to be compensated for these actions in respect of which the Tribunal awards the sum of 15,000 Swiss francs for moral damages.

27. At this point it is convenient to consider the relief claimed in the first complaint concerning the dismissal decision. As already indicated, the complainant claims reinstatement. That is a form of relief that can be granted in the case of a wrongful dismissal and the claim is receivable. However, it is not relief that is appropriately granted in the present case. There is no evidence that either his former post or that of Special Adviser – a post that he is unwilling to take up – remains available. As the dismissal decision must be set aside, the complainant must be paid the full salary and other entitlements that he would have received had his contract expired in accordance with its term on 21 March 2008, together with all allowances that would then have been payable in consequence of its termination. The salary and other entitlements must include the step increment due on 1 August 2007 but withheld “pending the disciplinary procedure in process”. That process has now concluded in the complainant’s favour. All amounts should bear interest at the rate of 8 per cent per annum from due dates until the date of payment. The complainant must give credit for any salary and/or associated allowances earned by him between 7 September 2007 and 21 March 2008. In addition, he should be paid by way of material damages an amount equivalent to one year’s salary and other entitlements.

28. In the first complaint, as well as in the second, the complainant claims damages for “the inaccurate and defamatory statements [...] spread [...] by the [defendant] in this unfortunate and extraordinary affair”. As already indicated, that claim is not receivable in the second complaint. Whether or not it is receivable in the first

complaint, there is no evidence of the making of any such statements. Accordingly, that claim is dismissed. The complainant also seeks damages for the “devious and reprehensible treatment” he received. The same claim has already been considered in relation to the eviction of the complainant from the office of the Secretary-General and, later, from the ITU building. The inconclusive nature of the evidence relating to the incidents in the Secretary-General’s office prevents any finding that would support any other aspect of that claim.

29. The complainant also claims in the first complaint that a “proper performance evaluation” be established for the year 2006 and that that evaluation be placed in his personal file. That claim is not receivable in the first complaint. The complainant had ample time to pursue that matter before his dismissal took effect and, in fact, did so in his request for review and in his internal appeal relating to his suspension. However, and as already indicated, the claim made in the body of the submissions in the second complaint that the performance appraisal made by the Secretary-General “be quashed and removed from his personal file” is receivable. It is not clear whether any performance appraisal report has been placed in the complainant’s file. But it is clear that the relevant performance appraisal procedures were never completed. In these circumstances, it will be ordered that any performance appraisal report for the year 2006 that has been placed in his file be removed from it.

30. In the body of the submissions in the first complaint it is claimed that the decision to assign the complainant to the post of Special Adviser should be quashed. As there was ample time to challenge that decision before the complainant’s dismissal took effect, that claim is irreceivable. No such claim is made in the second complaint and, thus, the issue need not be further considered.

31. A claim is made in the body of the submissions in both complaints that the decision to establish the Ad Hoc Commission of Inquiry was unlawful and for damages in consequence of its “flawed proceedings”. That claim is also irreceivable, no internal appeal having been instituted with respect to that decision even though there was

ample time to do so before the complainant's dismissal took effect. Indeed, the complainant acquiesced in the establishment of the Ad Hoc Commission of Inquiry.

32. As previously indicated, a claim is made in the second complaint that disciplinary proceedings be instituted against the officials responsible for the complainant's dismissal. The same claim is made in the first complaint. That is not an order the Tribunal can make. Accordingly, both claims are dismissed.

33. Given the inconclusive nature of the evidence of the incidents in the Secretary-General's office on the evening of 15 March 2007 and the fact that, in the main, the impugned decisions were taken by the Deputy Secretary-General in respect of whom there is no evidence of bias, ill will, malice or other improper purpose, this is not a case for exemplary damages. However, in addition to the damages payable in respect of the complainant's eviction from the Secretary-General's office and, later, from the ITU building, he should be paid moral damages in the sum of 10,000 Swiss francs for his unlawful suspension and dismissal.

34. The complainant is entitled to costs with respect to both complaints and, also, the anterior proceedings before the Ad Hoc Commission of Inquiry and the Joint Advisory Committee. The Tribunal assesses those costs at 12,000 francs.

35. Lastly, the applications for discovery, hearings and the production of documents are dismissed. The granting of those applications would not result in the reliable resolution of the differences in the accounts of the Secretary-General and the complainant with respect to the incidents in the Secretary-General's office on the evening of 15 March 2007. Other issues can readily be determined on the basis of the written submissions.

## DECISION

For the above reasons,

1. The Secretary-General's decision of 13 December 2007 is set aside, as is the earlier decision of the Deputy Secretary-General of 16 March 2007 suspending the complainant from duty.
2. The Deputy Secretary-General's decision of 4 September 2007 is set aside.
3. The ITU shall pay the complainant the full salary and other entitlements, including the step increment payable on 1 August 2007, that he would have received if his contract had expired on 21 March 2008, together with all allowances that would then have been payable. All such amounts shall bear interest at the rate of 8 per cent per annum from due dates until the date of payment. The complainant shall give credit for any salary and/or associated allowances earned by him in the period 7 September 2007 to 21 March 2008.
4. The ITU shall pay the complainant material damages equivalent to one year's salary and other entitlements with respect to his dismissal.
5. It shall also pay him moral damages in the sum of 25,000 Swiss francs.
6. Any document or other report relating to the complainant's performance appraisal for the year 2006 shall be removed from his personal file.
7. The ITU shall pay the complainant costs in the sum of 12,000 francs.
8. All other claims are dismissed.

In witness of this judgment, adopted on 5 November 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet